

ZOOM IN

The question:

‘No Man is an Island’, but... what is an Island?

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Islands in international law are a mixed blessing. On one hand, they may significantly augment the sovereign and jurisdictional rights of States, in particular over vast amounts of marine space. On the other, they pose complex problems concerning determination of their nature, whether they are considered alone (Natural or manmade? Islands or rocks? Full, half or no effect?) or whether they are considered as groups (Archipelagos or not?). Following the, mostly incidental, treatment of islands in a number of international law cases, principally concerned with delimitation of maritime boundaries, the Award of 12 July 2016 rendered by an Arbitral Tribunal constituted in accordance with UNCLOS Annex VII in the *South China Sea Arbitration* between The Philippines and China (the *China/Philippines Award* or the *Award*)¹ has eventually focused on these features, addressing a number of issues that arise from their existence, dimension and location.

Possibly the most innovative and significant feature of the *China/Philippines Award* has been the decision over the contested nature of a number of maritime features in the South China Sea under Chinese control. Despite its non-appearance in the proceedings, China claimed that those features should be qualified as ‘islands’, hence generating extensive maritime entitlements, including an exclusive economic zone and a continental shelf. The issue revolved around the interpretation and application of Article 121 UNCLOS, which states at paragraph 1 that ‘[a]n island is a naturally formed area of land, surrounded by water, which is above water at high tide’; and adds at paragraph 3 that ‘[r]ocks which cannot sustain human habitation or economic life of their own shall have

¹ *South China Sea Arbitration (The Republic of the Philippines v The People’s Republic of China)* PCA case no 2013-19 (Award of 12 July 2016) <<https://pcacases.com/web/sendAttach/2086>>.



no exclusive economic zone or continental shelf'. The *Award* represents the first judicial interpretation of the above provision and goes at great length and depth in its interpretation. Due to that, the case can be made that the relevance of the *Award* is not limited to the dispute between The Philippines and China, but it extends to numerous disputed geographical features at sea worldwide, including those subject to significant reclamation activities by States.

Another issue that was addressed, albeit to a lesser extent, by the Tribunal concerned the notion of 'archipelago'.² In paragraph 573 of the *Award*, the Arbitral Tribunal stated that a continental country which has oceanic islands does not enjoy the legal status of archipelagic State. Therefore, the principles in Part IV UNCLOS do not apply to the oceanic archipelagos belonging to continental States. This simple statement seems not to fully account for the much more complex issue at its basis. As it is known, the rights to be applied to oceanic archipelagos belonging to continental States attracted certain attention at UNCLOS III. However, the final version of UNCLOS leaves the issue out. Although UNCLOS avoided giving explicit arrangements for oceanic archipelagos belonging to continental States, in practice, some continental States have used similar measures reflected in Part IV in drawing the baselines for their oceanic archipelagos before and after UNCLOS III.³ It has been stated that the limitation indicated in Part IV UNCLOS – the principles of archipelagic States including archipelagic baselines only apply to archipelagic States – 'seems an unnecessary and unreasonable restriction'⁴ and that the recognition by other States of the practice of continental

² China's view is that it extends its sovereignty to Nansha Islands [Spratly Islands] in its entirety, not just some features thereof and that as a single unity under China's sovereignty, 'Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf' (see Note verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No CML/8/2011 (14 April 2011) <www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf>).

³ These States include Ecuador (with Galápagos Islands), Denmark (with Faroe Islands), Norway (with Svalbard Islands), Spain (with Canary Islands), and Portugal (with Azores Islands).

⁴ R Churchill, V Lowe, *The Law of the Sea* (3rd edn, Manchester UP 1999) 120.



States in using straight baselines to draw their baselines around their oceanic archipelagos 'must be regarded as being valid under customary international law'.⁵

We have invited two distinguished law of the sea scholars to discuss whether the interpretation rendered by the Tribunal is persuasive with regard to the dispute in the South China Sea and one that will prove authoritative and influential on present and future cases and disputes, thereby contributing to certainty and stability in the law of the sea. Relevant questions to be considered are the Tribunal's resort to Article 31 VCLT's interpretive tools; the relationship between 'human habitation' and 'economic life of their own' in the qualification of geographical features; the question of the 'critical date' on which an assessment over the two conditions must be made; the impact of reclamation activities, such as those conducted by China, over the qualification of a geographical feature as rock or island; the significance of the finding on archipelagos in light of present State practice.

⁵ *ibid* 121.